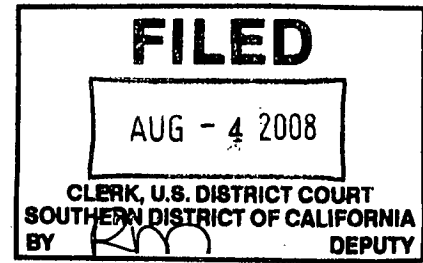
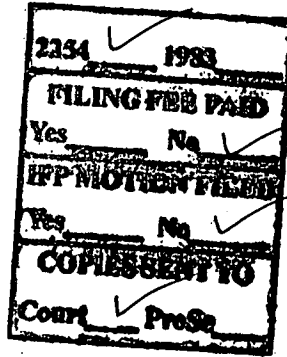


JOHNNY RICE JR.
 CDC NO. V-74293
 PO BOX 1902
 TEHACHAPI, CA. 93581



IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

'08 CV 1430 WQH PCL

JOHNNY RICE JR.
 PETITIONER
 VS.

REQUEST FOR EXTENSION
 OF TIME TO FILE A
 PROTECTIVE PETITION

FERNANDO GONZALEZ
 RESPONDENT

INTRODUCTION

PURSUANT TO 28 U.S.C. 2244 (d)(1), PETITIONER, JOHNNY RICE JR., (HEREAFTER PETITIONER) HEREBY REQUEST THAT THE DISTRICT COURT ISSUE A ORDER PERMITTING PETITIONER TO FILE A PROTECTIVE MIXED PETITION IN FEDERAL DISTRICT COURT AND STAY AND ABEY THE FEDERAL HABEAS PROCEEDINGS UNTIL CALIFORNIA STATE SUPREME COURT REMEDIES ARE EXHAUSTED.

GROUND FOR MOTION

THE UNITED STATES SUPREME COURT IN RHINES V. WEDER, 544 U.S. 269, ALLOWS THE DISTRICT COURT TO STAY A PETITION RATHER THAN DISMISS IT, AND HOLD IT IN ABEYANCE WHILE THE PETITIONER EXHAUSTS THE UNEXHAUSTED CLAIMS IN THE CALIFORNIA STATE SUPREME COURT.

STATEMENT OF FACTS

ON MAY 23, 2006, PETITIONER WAS CONVICTED BY A JURY FOR ROBBERY IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 211, AND ON JULY 7, 2006 WAS SENTENCED TO 154 YEARS TO LIFE IN STATE PRISON. ON OCTOBER 17, 2007, THE COURT OF APPEAL AFFIRMED THE CONVICTION.

PETITIONER IS PRESENTLY CONFINED IN THE CUI (AD-SEG) HOUSING UNIT AND FOR A PERIOD THAT EXCEEDS TEN MONTHS PRISON OFFICIALS REFUSAL TO ALLOW PETITIONER ACCESS TO HIS LEGAL DOCUMENTS HAS CREATED AN IMPEDIMENT IN FILING A WRIT OF HABEAS CORPUS CHALLENGING THE CONSTITUTIONALITY OF STATE COURT IMPOSED CRIMINAL CONVICTION AND THE SENTENCE THAT RESULTS FROM THAT JUDGMENT.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE UNITED STATES DISTRICT COURT MAY UPON A SHOWING OF "GOOD CAUSE" STAY A MIXED PETITION AND HOLD IT IN ABEYANCE WHILE THE PETITIONER EXHAUSTS THE UNEXHAUSTED CLAIMS IN THE CALIFORNIA STATE SUPREME COURT

BEFORE ENACTMENT OF THE AEDPA LIMITATIONS PERIOD 28 USC 2244 (a). IT WAS STANDARD PRACTICE FOR THE DISTRICT COURT TO DENY A MIXED PETITION WITHOUT PREJUDICE.

SEE: PLILER V. FORD (2004) 524 U.S. 225, 236, NL 159 L.ED. 2d. 338,

1 351 NL, 124 S. CT. 2441. AFTER DISMISSAL, THE PETITIONER
 2 WOULD RETURN TO STATE COURT TO EXHAUST THE UNEXHAUSTED
 3 CLAIMS, AND THEN FILE A NEW FEDERAL PETITION CONTAINING
 4 BOTH THE PREVIOUSLY EXHAUSTED AND NEWLY EXHAUSTED
 5 CLAIMS. THE AEDPA'S 1-YEAR FILING DEADLINE MAKES IT
 6 IMPOSSIBLE IN SOME CIRCUMSTANCES TO ACCOMPLISH THIS.
 7 ANOTHER OPTION, DISMISSING ONLY THE UNEXHAUSTED CLAIMS
 8 AND PROCEEDINGS ON THE EXHAUSTED CLAIMS, RISK FORFEITURE
 9 OF THE UNEXHAUSTED CLAIMS. IF THE ORIGINAL PETITION IS NO
 10 LONGER PENDING WHEN THE PETITIONER FILES A NEW PETITION
 11 CONTAINING THE PREVIOUSLY UNEXHAUSTED CLAIMS, THE
 12 LATER PETITION WILL BE TREATED AS A SECOND OR SUCCESSIVE
 13 PETITION UNDER 28 U.S.C. 2244 (b) (1) WHICH BARS REVIEW OF
 14 SUCH PETITIONS EXCEPT IN EXTREMELY LIMITED CIRCUMSTANCES.
 15 SEE: SLACK V. MC DANIEL (2000) 529 U.S. 473, 146 L. ED. 2D.
 16 542, 120 S. CT. 1595, TO AVOID THESE POTENTIAL DILEMMAS,
 17 SEVERAL CIRCUITS, INCLUDING THE NINTH CIRCUIT, HAVE
 18 ADOPTED A PROCEDURE KNOWN AS "STAY AND ABEYANCE" OR
 19 "WITHDRAWAL AND ABEYANCE" TO DEAL WITH MIXED PETITIONS.
 20 THIS PROCEDURE, AS DESCRIBED AND APPROVED BY THE
 21 SUPREME COURT IN RHINES V. WEDER (2005) 544 U.S. 269, 276.
 22 161 L. ED. 2D. 440, 450, 125 S. CT. 1528, ALLOWING THE
 23 DISTRICT COURT TO STAY A MIXED PETITION RATHER THAN
 24 DISMISS IT, AND TO HOLD IT IN ABEYANCE WHILE THE
 25 PETITIONER EXHAUSTS THE UNEXHAUSTED CLAIMS IN STATE
 26 COURT. ONCE THE PETITIONER HAS EXHAUSTED THE CLAIMS

1 IN STATE COURT THE FEDERAL COURT CAN LIFT THE STAY AND
 2 PROCEED WITH LITIGATION ON ALL THE CLAIMS. THE RHINES
 3 COURT APPROVED THE USE OF THIS PROCEDURE FOR CASES IN WHICH
 4 THE UNEXHAUSTED CLAIMS ARE NOT PLAINTIFF MENTLESS, THE
 5 PETITIONER HAS NOT ENGAGED IN ABUSIVE LITIGATION TACTICS OR
 6 INTENTIONAL DELAY, AND THERE IS GOOD CAUSE FOR THE
 7 PETITIONER'S FAILURE TO EXHAUST STATE REMEDIES. 544 U.S. AT
 8 277. 161 L. ED. 3d. AT 451. IN JACKSON V. ADE. (9TH CIR 2005)
 9 425 F. 3d. 654. 661. THE NINTH CIRCUIT CLARIFIED THAT
 10 PETITIONER NEED ONLY "GOOD CAUSE" AND NOT "EXTRADINART
 11 CIRCUMSTANCES" TO BE ENTITLED TO A STAY AND ABEYANCE
 12 OF THE FEDERAL CASE SO THAT THE PETITIONER CAN EXHAUST HIS
 13 STATE REMEDIES. PETITIONER FOR A PERIOD THAT EXCEEDS TEN TO
 14 MONTHS HAS MADE A GOOD FAITH EFFORT TO OBTAIN HIS LEGAL
 15 DOCUMENTS PURSUANT TO CASE NO# FV1022959, HOWEVER, COI
 16 PRISON OFFICIALS REFUSAL TO ALLOW PETITIONER ACCESS TO HIS
 17 LEGAL DOCUMENTS CAN ESTABLISH "GOOD CAUSE" SHOWING THAT
 18 HE WAS PREVENTED FROM RAISING THE CLAIM.

19 20 CONCLUSION

21 THE MOTION SHOULD BE GRANTED BECAUSE PETITIONER'S
 22 CASE FALLS WITHIN THE MEANING OF "GOOD CAUSE".

23
24 DATED: 7-23-08

RESPECTFULLY SUBMITTED,

25
26 *Johnny Rice*

27 JOHNNY RICE JR.
 28 PETITIONER IN PRO-PER.

JS44

(Rev. 07/89)

The JS-44 civil cover sheet and the information contained herein neither create nor supplant the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Johnny Rice Jr.

Fernando Gonzalez

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN U.S. PLAINTIFF CASES)

Fern

CIVIL COVER SHEET

2254-1 1983

FILING FEE PAID

Yes No

IF MOTION FILED

Yes No

COPIES SENT TO

Court Pro Se

FILED

AUG - 4 2008

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Johnny Rice Jr.
PO Box 1902
Tehachapi, CA 93581
V-74293

ATTORNEYS (IF KNOWN)

'08 CV 1430 WQH PCL

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PT | DEF | | PT | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> Marine <input type="checkbox"/> Miller Act <input type="checkbox"/> Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury-Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (13958) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSL (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reappointment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Tort to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input checked="" type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights			

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions):

JUDGE

Docket Number

DATE 8/4/2008

SIGNATURE OF ATTORNEY OF RECORD

R. M. Wells